Not To Be Published:

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA EASTERN DIVISION

STEVEN B. HEPPERLE,	
Petitioner,	No. C01-2043-MWB
vs. JOHN AULT, Warden, Respondent.	MEMORANDUM OPINION AND ORDER REGARDING MAGISTRATE'S REPORT AND RECOMMENDATION ON PETITIONER'S WRIT OF HABEAS CORPUS
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I. INTRODUCTION

A. Procedural Background

On March 28, 1986 petitioner Steven B. Hepperle ("Hepperle") was convicted of one count of first-degree murder by a jury of his peers. Hepperle was sentenced to life imprisonment, and is currently an inmate at the Anamosa State Penitentiary in Anamosa, Iowa.

Hepperle appealed his sentence—but, on November 30, 1987, the Iowa Court of Appeals affirmed the sentence and the Iowa Supreme Court denied further review. On Setember 17, 1990, Hepperle filed an application for postconviction relief, which was denied by the Iowa district court on March 25, 1997. Hepperle's appeal of the denial of postconviction relief was subsequently denied by the Iowa Court of Appeals on May 26, 1999. Hepperle did not seek further review by the Iowa Court, and precedendo issued from that court on July 7, 1999.

On July 17, 2000, Hepperle filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 3). The petition was referred to United States Magistrate Judge Paul A. Zoss pursuant to 28 U.S.C. § 636(b)(1)(B). On August 9, 2000, respondent John Ault ("Ault") filed a motion for partial summary judgment in which he asserted that three of Hepperle's four claims were procedurally defaulted. The parties agreed that the

fourth claim was meritless. On January 4, 2001, Judge Zoss filed a Report and Recommendation in which he recommended that the meritless claim be dismissed. Further, as the three remaining claims, Judge Zoss found that one was exhausted and that two were unexhausted yet not procedurally defaulted. Judge Zoss recommended Hepperle be given the opportunity to notify the court as to whether he wished to proceed with his one exhausted claim or dismiss his petition to pursue his two unexhausted claims in state court. On January 26, 2001, the undersigned adopted Judge Zoss's Report and Recommendation. As the petition was a mixture of exhausted and unexhausted claims, Hepperle chose to file a notice that he was dismissing his petition without prejudice. On February 2, 2001, an order was entered dismissing Hepperle's original petition for a writ of habeas corpus without prejudice.

Hepperle returned to state court and on March 9, 2001, he filed a motion to reinstate his post-conviction appeal. In May 2001, Justice Mark Cady of the Iowa Supreme Court denied Hepperle's motion to reinstate. On August 22, 2001, a three-judge panel of the Iowa Supreme Court affirmed Justice Cady's ruling. Both of these decisions were rendered summarily, without an opinion explaining the Iowa court's reasoning.

On July 16, 2001, Hepperle filed a new petition for a writ of habeas corpus with this court in which he asserted four grounds for relief. The new petition was referred to Judge Zoss pursuant to 28 U.S.C. § 636(b)(1)(B). Ault filed a motion to dismiss on October 17, 2001—asserting that Hepperle's petition was barred by the statute of limitations contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), or alternatively that Hepperle's claims were procedurally defaulted. (Doc. No. 11). On July 26, 2002, Judge Zoss filed a Report and Recommendation in which he recommended that Ault's motion to dismiss be denied. (Doc. No. 31). Ault filed objections to Judge Zoss's Report and Recommendation on August 7, 2002 (Doc. No. 32),

and Hepperle filed a resistance to Ault's objections on August 19, 2002 (Doc. No. 33). On August 30, 2002, the undersigned entered an order accepting Judge Zoss's Report and Recommendation and denying Ault's motion to dismiss. (Doc. No. 34).

On April 24, 2003, Hepperle filed a brief, on the merits, in support of his habeas corpus petition. (Doc. No. 48). Basically, Hepperle asserted two grounds for relief: (1) Hepperle alleged that his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966) were violated; and (2) Hepperle contended that his trial counsel was ineffective for failing to investigate and offer evidence that another man, Dale Viers, and not Hepperle, was the real murderer. On May 20, 2003, Ault filed a brief on the merits. (Doc. Nos. 49 & 50). On February 13, 2004, Judge Zoss filed a Report & Recommendation in which he recommended that Hepperle's petition be denied, that no certificate of appealability issue, and that judgment be entered in favor of Ault against Hepperle. (Doc. No. 52). On March 10, 2004, Hepperle filed his objections to Judge Zoss's Report and Recommendation. (Doc. No. 55). Hepperle did not object to Judge Zoss's legal analysis of his *Miranda* claim, but strenuously objected to the analysis of the ineffective assistance of counsel claim. The court, therefore, undertakes the necessary review of Judge Zoss's recommended disposition of Hepperle's petition for a writ of habeas corpus.

B. Factual Background

In his Report and Recommendation, Judge Zoss adopted the finding of facts he made in his Report and Recommendation on Ault's motion to dismiss. (Doc. No. 52). The facts are as follows:

On July 17, 1985, at about 8:00 a.m., the lifeless body of Diane Voss was discovered by her six-year-old son. The

victim was lying face down on the floor next to her bed in the Voss residence in Waterloo, Iowa. She was naked except for a man's bathrobe that was draped around her. She had bruises on her neck, face, ankles and wrists, and she had been bound and sexually abused. An autopsy revealed the victim's cause of death to be ligature strangulation.

There was no sign of forced entry at the house. The victim's husband, Vern Voss, had made a collect telephone call to his wife from out of town at about 10:30 p.m. on the night of the 16th. The Vosses' three sons had slept through the night in the family home without being awakened. Several items were missing from the Vosses' bedroom drawers and closets, including the victim's undergarments and much of her clothing, as well as a coffee can containing about \$30.00 in change.

The Waterloo Police Department investigated the crime. They dusted the entire house for fingerprints, and interviewed neighbors and friends of the victim and her family. The police considered four people as suspects including Vern Voss, the victim's husband; Mike Winters, a friend of Vern's; Dale Viers, a neighbor and known voyeur; and Hepperle, a former neighbor.

On July 18, 1985, police went to Hepperle's home in Evansdale, Iowa, to question Hepperle's girlfriend. During her interview, the girlfriend made an unsolicited statement claiming Hepperle was with her at the time of the Voss murder. Police asked Hepperle to come to the Waterloo Police Station for interrogation. Hepperle agreed, and rode with an officer to the station. At the station, Hepperle was interviewed for about two hours in a closed room in which Hepperle and an officer were the only persons present. At the time of the interview, Hepperle was on parole from a prior sexual abuse conviction. Hepperle told the officers that on the night of the murder, he had been at two specific bars with friends and then had returned to the Evansdale residence to spend the night. Police had difficulty confirming Hepperle's alibi. Officers interviewed Hepperle several additional times

at his place of employment. At some point during his interviews, Hepperle told police he had been at the Voss residence on July 16th, to use the telephone. On July 26, 1985, police learned Hepperle's fingerprints had been identified as among those taken at the scene. One of the fingerprints was inside a dresser drawer where the victim had kept undergarments, which were missing. Another fingerprint was found on a plexiglass window pane at the rear of the house, at the location of an attempted burglary reported by the victim a few days prior to the murder. Hepperle was arrested and charged with the murder.

Further evidence against Hepperle included a letter he wrote to an acquaintance asking her to help him fabricate an alibi. The recipient refused the request and informed police about the letter. Police also talked with Dale Viers, a "peeping Tom" who had been listening outside the victim's window at or close to the time of the murder. Viers said he had heard statements made by a man whose voice was similar to Hepperle's. In addition, Hepperle apparently confessed to another inmate in jail that he had killed Voss, providing details of the murder.

Hepperle had been convicted previously of third-degree sexual abuse in Marshall County, Iowa. The victim of that crime, Sherri Ferguson, testified at trial about the facts of the prior crime, which were similar to the facts surrounding the Voss murder.

At trial, Hepperle argued the fingerprints were made on earlier occasions, and he suggested his alibi witnesses were "confused" when they talked to police. The defense focused on Vern Voss as the "real" murderer, pointing to his recent purchase of a \$100,000 life insurance policy on his wife, and the fact that he seldom called home when he was out of town overnight on business. The defense argued Vern could have made the collect phone call from his motel room in Coralville, Iowa, to establish an alibi, and still had time to drive to Waterloo to commit the murder.

Report and Recommendation on Respondent's Motion to Dismiss, Doc. No. 31, at 2-4.

II. LEGAL ANALYSIS

A. Standard Of Review

Pursuant to statute, this court's standard of review for a magistrate judge's report and recommendation is as follows:

A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). Similarly, Federal Rule of Civil Procedure 72(b) provides for review of a magistrate judge's report and recommendation on dispositive motions and prisoner petitions, where objections are made, as follows:

The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b).

The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g., Hosna v. Groose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir.

1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*). Because objections have been filed in this case to Judge Zoss's legal conclusions, the court must conduct a *de novo* review.

However, Hepperle's objections are directed only at Judge Zoss's recommendations as to the ineffective assistance of counsel claim. Hepperle expressly states that he does not object to Judge Zoss's *Miranda* analysis, nor Judge Zoss's recommendation that his *Miranda* claim be denied. The plain language of the statute governing review provides only for *de novo* review of "those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Therefore, portions of the proposed findings or recommendations to which no objections are filed are reviewed only for "plain error." *See Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir. 1994) (reviewing factual findings for "plain error" where no objections to the magistrate judge's report were filed). Upon reviewing Judge Zoss's Report and Recommendation on Hepperle's *Miranda* claim, the court finds no "plain error" and accepts this portion of his Report and Recommendation.

B. Objections To Legal Conclusions

1. General standards for § 2254 relief

Section 2254(d)(a) of Title 28, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 governs Hepperle's petition.

Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable

application of . . . clearly established Federal law, as determined by the Supreme Court of the United States."

Williams v. Taylor, 529 U.S. 362, 404-05, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (quoting 28 U.S.C. § 2254(d)(1)). In this instance Hepperle seeks habeas relief under the second category. An "unreasonable application" of federal law by a state court can occur in two ways: (1) where "the state court identifies the correct governing legal rule from the [Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case"; or (2) where "the state court either unreasonably extends a legal principle from [Supreme] Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 407. It is not enough that the state court applied clearly established federal law erroneously or incorrectly—the application must additionally be unreasonable. *Id.* at 411; *see Bell v. Cone*, 535 U.S. 685, 694, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) ("an unreasonable application is different from an incorrect one.").

2. Standards for ineffective assistance of counsel claims

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In his Report and Recommendation, Judge Zoss outlined the two-prong test employed in determining the effectiveness of counsel, which was enunciated by the United States Supreme Court in *Strickland*. To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must demonstrate that (1) "counsel's

¹Section 2254(d)(2) also allows a writ of habeas corpus to issue if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d)(2); see cf. Sexton v. Kemna, 278 F.3d 808, 811 (8th Cir.), cert. denied, 537 U.S. 886, 123 S. Ct. 129, 154 L. Ed. 2d 145 (2002). Hepperle does not seek habeas relief on this ground.

representation fell below an objective standard of reasonableness;" and (2) "the deficient performance prejudiced the defense." Id. at 687, 104 S.Ct. 2052; Furnish v. United States of America, 252 F.3d 950, 951 (8th Cir. 2001) (stating that the two-prong test set forth in Strickland requires a showing that (1) counsel was constitutionally deficient in his or her performance and (2) the deficiency materially and adversely prejudiced the outcome of the case); Garrett v. Dormire, 237 F.3d 946, 950 (8th Cir. 2001) (same). Trial counsel has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691, 104 S.Ct. 2052. Indeed, "counsel must exercise reasonable diligence to produce exculpatory evidence[,] and strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir.), cert. denied, 502 U.S. 964, 112 S. Ct. 431, 116 L. Ed. 2d 450 (1991). However, there is a strong presumption that counsel's challenged actions or omissions were, under the circumstances, sound trial strategy. Id. at 689, 104 S.Ct. 2052; Collins v. Dormire, 240 F.3d 724, 727 (8th Cir. 2001) (in determining whether counsel's performance was deficient, the court should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ") (citing Strickland). With respect to the "strong presumption" afforded to counsel's performance, the Supreme Court specifically stated:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to

reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689, 104 S. Ct. 2052 (citations omitted).

To demonstrate that counsel's error was prejudicial, thereby satisfying the second prong of the *Strickland* test, a habeas petitioner must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. The court will now analyze each of Hepperle's assertions of error upon which he bases his ineffective assistance of counsel claims.

3. Application to Hepperle's objections

a. Objection—legal standard used by Judge Zoss

Hepperle first contends that Judge Zoss applied an erroneous legal standard in evaluating his ineffective assistance of counsel claim—thus, reaching an incorrect conclusion as to the disposition of his habeas petition. Hepperle's argument is somewhat convoluted, but the court will try to accurately present it here. Hepperle first generally asserts that Judge Zoss applied an erroneous legal standard under the *performance* prong of the *Strickland* test. However, in addressing the grounds for his objection, Hepperle argues that Judge Zoss erroneously applied a "fundamentally unfair" overlay to the evaluation of the *prejudice* prong of the *Strickland* test. As Judge Zoss disposed of the ineffective assistance of counsel claim solely on the basis that Hepperle could not meet the

prejudice prong, without reaching the performance prong, the court can only assume that Hepperle's intent was to challenge the legal standard applied in the *prejudice* analysis.

Judge Zoss, in discussing the standards for analyzing an ineffective assistance of counsel claim, noted that the *Strickland* test consisted of two prongs, performance and prejudice, and that failure to establish *both* prongs would result in a denial of habeas relief. Report & Recommendation, Doc. No. 31, at 9-11. After detailing the requirements under each prong, Judge Zoss made this concluding statement:

a conviction or sentence will not be set aside 'solely because the outcome would have been different but for counsel's error, rather the focus is on whether 'counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'

Id. at 11 (quoting Mansfield v. Dormire, 202 F.3d 1018, 1022 (8th Cir. 2000) in turn quoting Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 190 (1993)). Hepperle bases his argument that an improper standard was applied solely on this statement—specifically, that in evaluating his ineffective assistance of counsel claim, Judge Zoss erroneously focused on whether counsel's error rendered the proceeding fundamentally unfair.

It is true that the Supreme Court has admonished the application of a 'fundamentally unfair' overlay to the traditional *Strickland* prejudice analysis except in rare situations. In *Nix v. Whiteside*, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986), the defendant claimed that his counsel was ineffective for interfering with his plan to offer perjured testimony—arguing that he was prejudiced by counsel's interference in that his perjury, if believed by the jury, would have resulted in his acquittal. *Id.* at 162-63, 106 S. Ct. 988. The Court held it unjust, in this situation, to hold that the likelihood of a different outcome amounted to 'prejudice' as contemplated by *Strickland*. *Id.* at 175-76, 106 S. Ct. 988.

Though the offer of perjured testimony could have altered the outcome of the trial, the Court determined that it was not fundamentally unfair to find that the defendant was not prejudiced via his counsel's interference as prejudice cannot be based on "a right the law simply does not recognize." *Id.* at 186 (Brennan, J., concurring in judgment). In *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993), the Court reiterated that the denial of a substantive or procedural right *that the law does not recognize* does not amount to legitimate 'prejudice' under the *Strickland* test. *Id.* at 373, 113 S. Ct. 838.

In *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), the Court described the limited application of the 'fundamental fairness' analysis employed in *Nix* and *Lockhart*:

Cases such as *Nix v. Whiteside*, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986) and *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993), do not justify departure from a straight-forward application of *Strickland* when the ineffectiveness of counsel *does* deprive the defendant of a substantive or procedural right to which the law entitles him.

Id. at 393, 120 S. Ct. 1495 (emphasis in original). The Williams Court held that the

(continued...)

²Justice O'Connor, in a concurring opinion in *Lockhart*, also recognized the limited application of a 'fundamental fairness' consideration in determining whether prejudice was legitimate:

I write separately only to point out that today's decision will, in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). The determinative question—whether there is 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' *id.*, at 694, 104 S. Ct. 2052—remains unchanged. This case, however, concerns the

Virginia Supreme Court had erred in holding that *Lockhart* "modified or in some way supplanted the rule set down in *Strickland*." *Id.* at 391, 120 S. Ct. 1495.

Clearly, as Hepperle asserts denial of his right to present evidence that someone else committed the crime, the traditional *Strickland* analysis applies. *Id.* However, despite Hepperle's contention, Judge Zoss's general characterization of an ineffective assistance of counsel claim as an inquiry, in part, into whether counsel's errors rendered the proceedings fundamentally unfair does not amount to the application of an erroneous standard. First, many courts have recognized that at the core of a Strickland analysis is the concept of fundamental fairness. Strickland, 466 U.S. at 697, 104 S. Ct. 2052 ("An ineffectiveness claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged."); see, e.g., Mansfield v. Dormire, 202 F.3d 1018, 1022 (8th Cir. 2000), cert. denied, 531 U.S. 1154, 121 S. Ct. 1102, 148 L. Ed. 2d 972 (2001) (noting that the focus is on whether the deficient performance rendered the proceeding fundamentally unfair); Mueller v. Angelone, 181 F.3d 557, 578-79 (4th Cir.), cert. denied, 527 U.S. 1065, 120 S. Ct. 37, 144 L. Ed. 2d 839 (1999) (recognizing that habeas relief is available only if the "result of the proceeding was fundamentally unfair or unreliable.") (citing Lockhart, 506 U.S. at 369, 113 S. Ct. 838); Bertolotti v. Dugger, 883 F.2d 1503, 1510 (11th Cir. 1989), cert. denied, 497 U.S. 1032, 110 S. Ct. 3296, 111 L. Ed. 2d 804 (1990) (citing *Strickland* for the premise that the focus of the inquiry is on the fundamental

Lockhart, 506 U.S. at 373, 113 S. Ct. 838 (O'Connor, J., concurring) (emphasis added).

²(...continued)

unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a mater of law, ought not inform the inquiry.

fairness of the challenged proceeding); Hobbs v. Blackburn, 752 F.2d 1079, 1082 (5th Cir.), cert. denied, 474 U.S. 838, 106 S. Ct. 117, 88 L. Ed. 2d 95 (1985) ("The ultimate focus of the inquiry must be on the fundamental fairness of the challenged proceeding."). Further, it is clear from reading the Report and Recommendation that Judge Zoss's general statement did not translate into an improper application of a 'fundamental fairness' overlay to the traditional *Strickland* analysis. This conclusion is evidenced by the fact that Judge Zoss used the traditional causation in considering prejudice—Judge Zoss concurred with the Iowa Court of Appeals's finding that "Hepperle had failed to prove the result of the trial would have been different if his trial counsel had offered evidence to implicate Dale Viers in the murder." Report and Recommendation, Doc. No. 31, at 14. Other than the brief mention of "fundamentally unfair" in the discussion of the applicable standards, there is no mention or application of a fairness inquiry to buttress the finding of an absence of prejudice. While Judge Zoss did reiterate the position that fundamental fairness is the touchstone of the habeas analysis, he in no way impermissibly intimated that fundamental fairness altered, or superceded, the Strickland analysis. Hepperle's objection to the standards used by Judge Zoss in evaluating his habeas petition is therefore overruled.

b. Objection—characterization of evidence against Hepperle as 'overwhelming'

Hepperle next objects to Judge Zoss's characterization of the evidence implicating him in the murder of Diane Voss as 'overwhelming.' Hepperle contends that the evidence against him was almost entirely circumstantial—specifically, that (1) he did not confess to the murder; (2) neither his fingerprints or any other physical evidence were found on the body; (3) the fact that his fingerprints were found on the window pane and dresser drawer is not surprising due to his acquaintance with the victim—which is not nearly as compelling as the fingerprint of a stranger; (4) the majority of the case against him focused on his

arguably conflicting testimony as to his whereabouts on July 16-17 and the testimony of an informant. Hepperle contends that as there is *no direct evidence* linking him to Diane Voss's death, the characterization of the evidence against him as 'overwhelming' is inappropriate.

In examining petitions for writs of habeas corpus arising under 28 U.S.C. § 2254 the factual findings of state courts are accorded a presumption of correctness. *See, e.g., Robinson v. LaFleur*, 225 F.3d 950, 953 (8th Cir.2000) ("We presume the state court's factual findings to be correct;. . . ."); *Owens v. Dormire*, 198 F.3d 679, 682 (8th Cir.1999) ("State court findings of fact are entitled to a presumption of correctness.") (citing 28 U.S.C. § 2254(e)(1) (Supp. III 1997)). The presumption of correctness applies with equal force to the findings of both trial and appellate courts. *See Perry v. Kemna*, 356 F.3d 880, 883 (8th Cir.2004) (noting that the "presumption of correctness applies to factual determinations made by state courts, whether the court be a trial court or an appellate court.") (quoting *King v. Bowersox*, 291 F.3d 539, 540 (8th Cir.2002)); *Tunstall v. Hopkins*, 306 F.3d 601, 605 (8th Cir. 2002), *cert. denied*, 538 U.S. 968, 123 S. Ct. 1767, 155 L. Ed. 2d 525 (2003) (noting that the presumption of correctness applies to all factual determinations by both trial and appellate courts at the state level).

A state court decision involves 'an unreasonable determination of the facts in light of the evidence presented in state court proceedings,' 28 U.S.C. § 2254(d)(2), only if it is shown by clear and convincing evidence that the state court's presumptively correct factual findings do not enjoy support in the record.

Lomholt v. Iowa, 327 F.3d 748, 752 (8th Cir. 2003) (citations omitted); see 2254(e)(1) (noting that the petitioner has the burden of rebutting the presumption accorded state court factual findings by clear and convincing evidence). In this matter, Hepperle does not

appear to challenge the *factual findings* of the postconviction relief court, as adopted by Judge Zoss in his Report and Recommendation, but rather focuses on the failure of the postconviction relief ("PCR") court to consider his trial counsel's failure to present evidence pointing to Viers as the actual murderer. Therefore, as the PCR court's factual statement of the evidence, and theory of the State's case against Hepperle, stands unrebutted by Hepperle, it is accepted as fact and provides a backdrop for Hepperle's ineffective assistance of counsel claim. The Iowa Court of Appeals summarized the evidence against Hepperle as follows:

- a. He was a former neighbor of the victim, was personally acquainted with her and had been in her house before;
- b. His fingerprint was found inside one of the drawers on the dresser in the victim's bedroom; her underwear was usually kept in that drawer, but was missing; the fingerprint could not be dated, but was in a position where it could have been easily rubbed off;
- c. His fingerprint was also found on a plexiglass window pane in the back of the victim's house. The location of th (sic) print was consistent with the removal of the pane; the victim had reported an attempted burglary through that door a few days before her death;
- d. His alibi testimony was inconsistent and not confirmed by the persons he (sic) Claimed to be with;
- e. He wrote a letter to an acquaintance asking her to help him fabricate an alibi, but she refused and informed the police;
- f. He confessed to killing Voss to an inmate in jail, providing details;
- g. He had been previously convicted of third degree sexual abuse in Marshall County, Iowa and the facts of that crime were very similar;
- h. Dale Viers, a window peeper outside the victim's window, overheard statements made by a man whose voice was very similar to Hepperle's.

Addendum to Respondent's Brief on the Merits, Doc. No. 50, ref. no. E: *Hepperle v. State*, No. 71472 (Iowa District Court for Blackhawk County Mar. 25, 1997) at 4-5. The PCR court also adopted the following theory of the State's case as part of its findings:

Hepperle tried unsuccessfully to break into the Voss home on July 13 when the victim's husband was not home. He returned on the evening of July 16 and used some ruse to gain entry into the home, bound the victim and strangled her. Afterwards he tried to manufacture an alibi, but when the police discredited his alibi, he tried to find someone else to help fabricate one.

Id. at 5. In according this factual background the presumption of correctness it is entitled to, the court finds that the evidence against Hepperle could reasonably be classified as 'overwhelming.' Judge Zoss's conclusion did not mark the first time the evidence against Hepperle was classified in this manner—the PCR court also stated that "[t]he unchalleneged evidence in this case presents overwhelming evidence of guilt." Id. at 7. Hepperle's objection to Judge Zoss's categorization of the evidence against him as 'overwhelming' is **overruled**.

c. Objection—finding of a lack of evidence pointing to Viers as the real murderer and failure to address performance

This objection, which takes issue with Judge Zoss's finding a lack of evidence pointing to Mr. Viers as the real murderer, comprises the bulk of Hepperle's opposition to the Report and Recommendation. Hepperle contends that a vast array of evidence pointing to Viers as the perpetrator was available, but unused by trial counsel: (1) Gary McCormack, a private investigator hired by trial counsel, testified at the PCR hearing that Viers had repeatedly stated that he may have committed the murder, though McCormack did not believe him; (2) Viers failed a polygraph aimed at his whereabouts on the night of

the murder, though he later passed a second polygraph; (3) Melinda Viers, Viers's wife, came to the conclusion that Viers had committed the murder based on his bizarre behavior on the night in question—specifically, Viers's obsession with Voss, Viers's paranoid demeanor, and Viers's attempted strangulation of her later that evening; (4) Viers admitted to trespassing into an apartment and sexually assaulting Tracey Cue, a 15 year-old girl, on the night of the murder; and (5) Officer Steve Nemmers's police report indicated that Viers had possibly made statements to Judy Shrum, Tawnee Luck and Phyllis Baych from which Viers's involvement in the Voss murder could be inferred. In essence, Hepperle objects to Judge Zoss's disregard for this potential evidence pointing to Viers as the true murderer, and claims that the Iowa Court of Appeals unreasonably applied *Strickland* in summarily disposing of his claim considering trial counsel's failure to present this 'strong' evidence pointing to Viers.

Hepperle also takes issue with the fact that so far, the review of his position has focused only on the 'prejudice' prong without regard to his counsel's grossly ineffective assistance in failing to offer evidence pointing to Viers. As Hepperle must make a showing under both *Strickland* prongs in order for habeas relief to be granted, the court is at liberty to analyze the prongs in any order it sees fit as the failure to make a case under one of the prongs is sufficient for a denial of the habeas petition. *See Tokar v. Bowersox*, 198 F.3d 1039, 1046 (8th Cir. 1999), *cert. denied*, 531 U.S. 886, 121 S. Ct. 204, 148 L. Ed. 2d 143 (2000). The court will begin its evaluation of Hepperle's petition with an analysis of trial counsel's performance.

³The court would like to note that the fact that it has chosen to analyze the performance prong first in no way calls into question Judge Zoss's decision to analyze only the prejudice prong. The law is clear in that "if it is easier to dispose of an ineffectiveness (continued...)

i. **Performance**. Defense counsel has a "duty to make reasonable investigations" or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691, 104 S. Ct. 2052. In making an assessment of reasonableness, the court looks at the facts of the case "viewed as of the time of counsel's conduct." Id. at 690, 104 S. Ct. 2052 (emphasis added). "Counsel's decisions are presumed reasonable and 'strategic choices made after thorough investigation of law and facts . . . are virtually unchallengeable." Simmons v. State of Iowa, 28 F.3d 1478, 1481 (8th Cir. 1994) (quoting Strickland, 466 U.S. at 691, 104 S. Ct. 2052). To determine whether Hepperle has raised a viable objection, the court looks to the facts and circumstances at the time of trial and not at the situation from a perfected hindsight perspective. See Strickland, 466 U.S. at 689, 104 S. Ct. 2052. In light of these principles, the court will now consider Hepperle's contention that his trial counsel was ineffective for failing to offer Viers as an alternative perpetrator of the crime.

The crux of Hepperle's argument is that trial counsel, Gary Kazragis, had evidence *available to him* that pointed to Viers as a suspect, but unreasonably chose not to present this evidence or present Viers as a suspect at trial. Specifically, Hepperle focuses on trial counsel's failure to offer the testimony of investigator Gary McCormack ("McCormack"),

³(...continued) claim on the ground of lack of sufficient prejudice, that course should be followed." *Tokar v. Bowersox*, 198 F.3d 1039, 1046 (8th Cir. 1999). Additionally, as the court will undertake an analysis of trial counsel's performance, Hepperle's objection to Judge Zoss's failure to analyze the performance prong after finding an absence of prejudice is **overruled**.

Officer Steve Nemmers ("Nemmers"), and Melinda Viers as to the possibility that Viers, not Hepperle, murdered Voss.

McCormack was hired by trial counsel on behalf of Hepperle, and in the course of his investigation he interviewed a number of persons, including Viers. During the course of his interview with McCormack, Viers discussed his activities on July 16-17, 1985. Viers discussed his sexual assault on Tracey Cue—specifically, that he followed her home the evening of July 16, waited for her to fall asleep on the living room couch, broke into her apartment and masturbated as he touched her leg. PCR Transcript at 75. After this incident, Viers indicated that he climbed a tree outside the victim's bedroom window to peep at her—something which he had also done on prior occasions. *Id.* at 76. Though Viers could not see into the window that night, he did hear moaning, groaning and voices.

Id. With regard to whether Viers committed the murder, McCormack testified:

A: Mr. Viers told me that—at more than one occasion he wasn't sure but that he had done the murder. But he was—he said that he had been on drugs for like six days in a row and that he was sure that all these things had happened, but he had a pretty difficult time putting things—exactly pinpointing the exact times, but he was sure he had done all those things.

He actually thought—on one or more occasions he thought he had actually killed Diane Voss, *but then I believe he didn't*.

* * *

A: He said that he had taken a polygraph test and that he had failed it and that the Waterloo Police Department—was not the result they wanted so that they had called in somebody else. . . . He said there was another polygraph given to him and the second time he passed it so that he figured then that he must not have done it.

Id. at 77, 78 (emphasis added). Hepperle contends that what Viers told McCormack is

tantamount to a 'confession' by Viers that he committed the murder, and as such it was unreasonable and prejudicial for trial counsel not to call McCormack to testify as to this information at trial. When asked why McCormack did not testify, Kazragis gave a couple of reasons based on strategy: (1) McCormack had uncovered evidence that was harmful to Hepperle's alibi; ⁴ (2) McCormack's written documentation was not sufficiently thorough; and (3) McCormack was apprehensive about testifying. Deposition of Gary Kazragis, PCR Hearing Plf.'s Exh. 1, at 28-29.

Nemmers, an officer with the Waterloo Police Department, also conducted an investigation into the Voss murder. In the course of his investigation, Nemmers interviewed many people—including, among others, Viers and those that came into contact with him on July 16-17, 1985. At the PCR hearing, Nemmers testified that Viers gave an account of his whereabouts that was similar to what he had told McCormack. Viers also told Nemmers that "he had since heard a voice up in the county jail that he had determined belonged to Steven Hepperle . . . and that that voice he heard that night of the murder sounded like the voice of Steven Hepperle." *Id.* at 20. In his investigative reports, Nemmers details the course of his investigation into the Voss murder—these reports were not introduced at trial. The first report details conversations with persons, such as Phyllis Baych and Tawnee Luck, whom Viers had spoken to on the night in question. *See* Habeas Exh. 1. Baych stated that on the night in question Viers came to her apartment and he was flushed as though he had been running, prompting her to ask him whether the police were chasing him. Viers told Baych that he had a problem with window peeking and that he had

⁴Though Kazragis testified that he believed McCormack had uncovered information harmful to Hepperle's alibi, looking solely at the record it appears as though Kazragis may have confused the information uncovered in McCormack's investigation with that uncovered in Officer Nemmers's investigation.

followed a young girl home and watched her. Though Baych asked him what happened, Viers did not elaborate on the incident. Baych felt uncomfortable around Viers due to the strange way he was acting, and asked him to leave. *Id.* at 5. In the second report Nemmers details a discrepancy between witnesses as to whether Viers stated that he strangled someone on the night in question:

[Judy] Strum stated that Baych came up on her porch as she was walking by and told her the story that a man had come to her house on the night of the murder and told her that he had just strangled a woman. Shrum stated that Baych did not go into detail of this incident.

Immediately after this, I went to the Phyllis Baych residence and again talked with her concerning what she had been saying about Dale Viers visit to her residence on the night of 071685. Baych was advised that I had talked with Shrum and related to her that Shrum had told me that Baych told her that a man had come to her house and told her that he had strangled a woman. Baych categorically denied ever saying such a thing. She did remember that she had talked to Judy Strum.

She continued that she did not tell anyone that Viers had killed anyone. She could not explain why Shrum, Tawnee Luck and possible others may be saying this. She did relate to them that Dale Viers may possibly be involved in the murder.

Habeas Exh. 2 at 1 (emphasis added). Nemmers's report continues with his investigation into Hepperle. Nemmers's report goes on to detail an incident in which Hepperle lured a female neighbor into his apartment and then "grabbed her by the back of her hair and slammed her head up against the refrigerator, pulling her head way back exposing her neck and then taking a pocket knife that he had in his hand and placing it against her neck." *Id.* at 3. After some time Hepperle let her go, and allowed her to leave, but gave no explanation for his actions. The female neighbor later approached Dawn Pitts, Hepperle's

live-in girlfriend, and told her of this incident. Pitts begged the neighbor not to call the police. Not wishing to cause Pitts any more problems, the neighbor did not report the incident. More crucial to this case is the fact that Nemmers's investigation calls into question Hepperle's alibi—Nemmers notes that Hepperle told police he was at the Packers Inn from approximately 10:00 p.m. to 2:00 a.m. on the night of July 16, 1985, however the owner of Packers Inn stated that he always closes the bar at 10:30p.m. on weeknights.

Finally, Hepperle contends that Melinda Viers (now Melinda Schooney) should have been called to testify as to her belief that Viers could have committed the murder. At the PCR hearing, Melinda Schooney recounted a couple of things which lead her to believe that her ex-husband Viers could have committed the crime. First, when Viers arrived back at their home Schooney noted that his behavior was extreme and unusual: "He was pale as a ghost, shaking, sweating, nervous, constantly turning and watching and looking out the windows to see if somebody was there." PCR Transcript at 51. Schooney also recounted that after she fell asleep that night she awoke to the following:

a couple hours later I woke up with Dale straddling me. I was on my back. He was straddling my right below my very pregnant stomach at the time, with his hands at my throat, telling me, "Tell my old lady and you will die, bitch." He said it about five times, with his hands at my throat. I had to kick him to get off of me and realize what he was doing.

Id. at 52. Finally, during a jail visit, Schooney asked him whether he was involved in the Voss murder, to which Viers replied: "'You should know the answer to that. I am not going to tell you.'" Id. at 60. Hepperle contends that these incidents were ones that the jury should have been made aware of as they directly point to Viers as the murderer. However, despite Schooney's adamant belief at the time of the PCR hearing that her exhusband could have committed the Voss murder, on September 5, 1985, Schooney signed

a voluntary statement made to Waterloo Police Officer John Beckham in which she unequivocally stated: "There is no doubt in my mind that Dale is not responsible for the death of Dianne Voss." PCR Hearing Exh. B, Doc. No. 50, at 4. Further, as far as the 'strangling incident,' Schooney's statement says that on the night of *July 27, 1985* (not the night of the murder as she testified at the PCR hearing), "Dale rolled over on top of me and formed his hands as if he was going to choke me, but never did. Dale woke up at that point and nothing else happened." *Id.* at 3.

During his deposition for the PCR hearing, trial counsel Kazragis testified that the defense focused on Vern Voss as the alternate perpetrator for the following reasons:

Um, again, without the file in front of me I'm a little handicapped, but I can tell you from my recollection that we centered on Mr. Voss for a number of reasons. First of all he had made a telephone call on the night of the murder, a collect telephone call, to his wife, which was not his pattern. As I remember it, Mr. Voss traveled for a photography studio. A second thing would have been when he made the telephone call, I believe he was in Washington, yeah. And had the ability to get back after the phone call was made so it would have appeared to have been a manufactured alibi. Thirdly, the, Mr. Voss', excuse me. My recollection is that there was a life insurance policy purchased close to the decedent's death for a principal sum of \$100,000. Which would have given him financial gain. Finally, it, one of the things and there may be more reasons, but the thing that strikes my recollection is that the person who made entry into the house did so without forced entry. What I mean is that they got into the house, committed the crime and did not disturb the three children who were asleep. So it would have appeared that it was a person familiar not only with the house and the goings on and where the people were sleeping, but a person who also could do so, could get in and out relatively quietly.

Deposition of Gary Kazragis, PCR Hearing Plf.'s Exh. 1., at 8-9. Kazragis also

emphasized that it was a *strategic* decision not to focus on Viers:

I'm not disagreeing that [it would have been reasonable] to argue that [Viers] was the perpetrator and there may have been other reasons to argue that, but the strategic choice that we had made was to focus on Mr. Voss for the reasons that I've related. And again this is a choice, a strategy that lawyers and clients have to make, but our feeling was that it was better strategically to focus on one individual as the perpetrator of the crime and make that focus more believable to take the focus off Mr. Hepperle. Likewise, Mr. Viers, and again I'm going on recollection, had a great deal of problems testifying and appeared to be kind of whimpy I guess is the word I'm thinking. And that also entered in to our decision after his deposition testimony, I think, and after his trial testimony. But that was a strategic choice.

Id. at 13 (emphasis added). Kazragis also stated that he did not believe Viers was credible and that he believed, due to the inconsistencies in Viers's recollection of the night, that Viers likely manufactured his entire account of his possible role in the Voss murder. *Id.* at 14.

Applying the heavy measure of deference the court must accord to counsel's strategic decisions, the court finds that Kazragis's determination to focus on Vern Voss as as the real perpetrator of the crime, rather than Viers, was reasonable. First, it was reasonable not to call McCormack as a witness for trial because after interviewing Viers he did not believe that Viers had committed the murder. On a number of occassions during his PCR testimony, McCormack stated that Viers seemed to be someone "whose brain was on drugs or fried on something." PCR Transcript at 73. Further, Viers told McCormack that in July 1985, up until his arrest at the end of the month, he was constantly under the influence of drugs. *Id.* at 78-79. This excessive drug abuse made Viers's comments to McCormack even less credible. Further, unlike Hepperle, this court

cannot categorize Viers's comments to McCormack—that he may have committed the murder, but he wasn't sure due to a week long drug binge he was on—as a confession. It appears as though Viers himself was, and still is, unsure as to whether or not he had any involvement in the Voss murder—likely due to his extensive use of drugs on that night. In this light, it was a reasonable strategic decision not to offer McCormack's testimony at trial. See Johnson v. Lockhart, 921 F.2d 796, 799 (8th Cir. 1990) (stating that "[o]nce an attorney interviews a witness, it becomes largely a matter of legal judgment as to whether the witness should be called to testify[,]" and counsel's decision not to call the witnesses "was clearly a matter of trial strategy."). Second, it was likewise reasonable for Kazragis to choose not to offer the testimony of Officer Nemmers—especially in light of the fact that Nemmers's second investigative report seriously called into question Hepperle's alibi. Third, as to Melinda (Viers) Schooney, the court must look at the information available to Kazragis at the time, Strickland, 466 U.S. at 690, 104 S. Ct. 2052—which consisted of Schooney's statement to police that she was certain that Viers had *no involvement* in the murder of Dianne Voss. Finally, conclusively reinforcing the court's finding that Kazragis's decision not to offer Viers as the perpetrator was reasonable is the fact that Hepperle testified at the PCR hearing that he was aware prior to trial of the Kazragis's defense strategy in focusing all efforts on Vern Voss as the 'real' perpetrator:

Q: The primary focus of Mr. Kazragis' questioning of witnesses and presentation of any evidence was to focus on weaknesses in the State's case or attacking the State's case and pointing the possible finger at Vern Voss as a suspect?

A: I believe that is true, yes.

Q:You were aware even prior to trial that is where the focus was heading during the—your investigation and Mr. Kazrakis' and Mr. McCormack's investigation in this matter?

A: Yes.

PCR Transcript at 132-133. Additionally, Kazragis testified that he made the tactical

decision to proffer Vern Voss rather than Viers as he believed it was in Hepperle's best interest, and was the most likely means to get Hepperle a not guilty verdict. Deposition of Gary Kazragis, PCR Hearing Plf.'s Exh. 1., at 41-42.

The court concludes that looking at the totality of the circumstances, Hepperle has failed to show that Kazragis's performance was not within the range of normal competency. This was not a case in which Kazragis failed to conduct an investigation—to the contrary, he hired a private investigator to look into the case on Hepperle's behalf. See Wilkins v. State of Iowa, 957 F.2d 537, 541 (8th Cir. 1992). Kazragis's decision to focus on Vern Voss as the alternate perpetrator was not only well-founded in reason and in evidence, but was also agreed to by Hepperle before his trial. Vern Voss was a reasonable choice as an alternate suspect—in many ways he was a superior choice to Viers because: (1) the recently issued life insurance policy on Diane Voss gave her husband a motive; (2) as there was no forced entry into the residence, unlike Viers, Vern Voss had the means to enter the home without waking the children present; (3) Vern Voss, unlike Viers, was someone the victim knew and trusted; and (4) as the time of death could not be pinpointed, Vern Voss could have easily driven the 50 miles to his home and returned back to the hotel in time to preserve his alibi. The court finds that "[c]ounsel's strategy choice was well within the range of professionally reasonable judgments." Strickland, 466 U.S. at 699, 104 S. Ct. 2052. The Iowa Court of Appeals's application of *Strickland* to reach the conclusion that trial counsel's tactical decisions were reasonable and that Hepperle could not establish deprivation of effective assistance of counsel was not "contrary to" or "an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). Hepperle's objection is **overruled**.

ii. **Prejudice.** Though failure of a habeas petitioner to establish one of the Strickland prongs is sufficient grounds for denial of the petition, as Judge Zoss's Report and Recommendation found that Hepperle's petition should be denied as he failed to establish prejudice, the court will very briefly address this prong in the interest of completeness. In addition to showing unreasonable representation by trial counsel, the defendant must also show that counsel's performance is prejudicial—which translates into showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the [trial] would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. 2052. In light of Hepperle's inability to rebut the presumption of correctness accorded to the facts found by the PCR court, discussed supra section 2.B.3.b, the court cannot find that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Id.* The evidence against Hepperle was overwhelming in comparison to that against Viers—there was no physical evidence connecting Viers to the crime, Viers had never provided the details of the crime to anyone on any occasion, Viers had not committed a strikingly similar crime in the past, Viers was not an acquaintance of Voss's and all of Viers's possibly incriminating behavior could be attributed to his excessive drug use as well as his paranoia for having committed a sexual assault on that very same night. The court reaches the same conclusion as did Judge Zoss: that the Iowa court reasonably applied the law to the facts of the case in finding Hepperle had not shown he was prejudiced by his trial attorney's performance.

C. Certificate Of Appealability

Hepperle must make a substantial showing of the denial of a constitutional right in order to be granted a certificate of appealability on these issues. *See Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir.), 531 U.S. 908, 121 S. Ct. 254, 148 L. Ed. 2d

184 (2000); Mills v. Norris, 187 F.3d 881, 882 n.1 (8th Cir. 1999); Carter v. Hopkins, 151 F.3d 872, 873-74 (8th Cir.), cert. denied, 525 U.S. 1007, 119 S. Ct. 524, 142 L. Ed. 2d 435 (1998); Ramsey v. Bowersox, 149 F.3d 749 (8th Cir. 1998), cert. denied, 525 U.S. 1166, 119 S. Ct. 1083, 143 L. Ed. 2d 85 (1999); Cox v. Norris, 133 F.3d 565, 569 (8th Cir. 1997), cert. denied, 525 U.S. 834, 119, S. Ct. 89, 142 L. Ed. 2d 70 (1998). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." Cox, 133 F.3d at 569. Hepperle has failed to make such a substantial showing. Therefore, with respect to these claims, the court shall not grant a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(3).

III. CONCLUSION

Hepperle's objections to Judge Zoss's legal conclusions are **overruled**. The court accepts Judge Zoss's Report and Recommendation. Accordingly, Hepperle's petition for writ of habeas corpus is **denied**. A certificate of appealability will not issue as to these claims.

IT IS SO ORDERED.

DATED this 23rd day of June, 2004.

MARK W. BENNETT

CHIEF JUDGE, U. S. DISTRICT COURT

NORTHERN DISTRICT OF IOWA

Jack W. Bernet